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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIAZAR HERRERA-VINEGAS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether The Decision Of The United States Court Of Appeals For The Fifth Circuit Affirming The District Court's Abuse Of The Writ Dismissal Of 28 U.S.C. § 2255 Motion, Deprived Petitioner Of A Proper Review Of His Right To A Fair Trial And His Sixth Amendment Rights, Due To The Absence Of A Language Interpreter During The Trial Of The Petitioner, A Spanish Speaking Individual Who Does Not Understand English, Thereby Denying The Petitioner His Constitutional Right To Understand The Proceedings Against Him In Order To Be Able To Assist Counsel In His Own Defense, Confront And Cross-Examine Witnesses With Knowledge Of The Testimony Of The Witnesses, And To Be Present At His Own Trial.

2.

The Decision Of The United States Court Of Appeals For The Fifth Circuit Affirming The Summary Denial Of The Petition For Writ Of Habeas Corpus Was Erroneous As It Was Based On The Improper Application Of The Doctrine Of Abuse Of The Writ And An Inaccurate Interpretation Of Petitioner's Affidavit.

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In The

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October Term, 1985

ELIAZAR HERRERA-VINEGAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRAYER

The Petitioner, Eliazar Herrera-Vinegas, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 25, 1985.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, which will not be published under Local Rule 47.5, appears in the Appendix attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals of the Fifth Circuit was entered on November 25, 1985. This petition is filed within 60 days of that date, and jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution is involved here and provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

The statutory provisions involved are 28 U.S.C. Section 2255, 28 U.S.C. Section 1827, and Federal Rules of Civil Procedure 9(b) and 56(c).

STATEMENT OF THE CASE

Petitioner, Eliazar Herrera-Vinegas, was indicted in June of 1977 in the United States District Court for the Western District of Texas for narcotics possession and distribution. Petitioner was found guilty and sentenced to a term of 45 years imprisonment, a 45 year special parole term, and a $100,000 fine.

The Petitioner speaks Spanish as his native tongue, and did not speak English at the time of his trial. There was no language interpreter present during the trial. Petitioner's privately retained counsel informed the trial court just prior to sentencing that he was not certain of the Petitioner's ability to understand the language and that he had difficulty communicating with the Petitioner.

Petitioner, through his trial counsel, appealed his conviction to the Fifth Circuit Court of Appeals, raising issues with regard to the sufficiency of the evidence but silent as to the interpreter issue. The Fifth Circuit Court of Appeals affirmed the conviction in an unpublished opinion.

Petitioner filed a pro se motion pursuant to 28 U.S.C. § 2255 in 1980. The District Court denied the petition without a hearing. Petitioner filed a second pro se motion pursuant to 28 U.S.C. § 2255 in August of 1983, raising as an issue for the first time failure of the Court and counsel to provide an interpreter. The District Court summarily denied the second pro se petition, invoking Rule 9(b), noting that although new issues were raised in the second petition, there had been no showing by the Petitioner as to why those grounds could not have been raised in his first petition.

Petitioner appealed, pro se, the dismissal of his second petition to the Fifth Circuit Court of Appeals, which reversed the district court, holding that the Petitioner should have been afforded an opportunity to explain his failure to raise all of his claims in his first § 2255 petition.

On remand, Petitioner filed an affidavit setting forth his response to the Rule 9(b) issue. The magistrate, without conducting a hearing, recommended that the petition be summarily dismissed. The district court, without de novo review, adopted the magistrate's recommendation.

The Fifth Circuit Court of Appeals affirmed the district court ruling, holding that the Petitioner failed to meet his burden in rebutting the charge of abuse of the writ, which the Petitioner seeks to challenge.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING THE DISTRICT COURT'S ABUSE OF THE WRIT DISMISSAL OF 28 U.S.C. § 2255 MOTION, DEPRIVED PETITIONER OF A PROPER REVIEW OF HIS RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHTS, DUE TO THE ABSENCE OF A LANGUAGE INTERPRETER DURING THE TRIAL OF THE PETITIONER, A SPANISH SPEAKING INDIVIDUAL WHO DOES NOT UNDERSTAND ENGLISH, THEREBY DENYING THE PETITIONER HIS CONSTITUTIONAL RIGHT TO UNDERSTAND THE PROCEEDINGS AGAINST HIM IN ORDER TO BE ABLE TO ASSIST COUNSEL IN HIS OWN DEFENSE, CONFRONT AND CROSS-EXAMINE WITNESSES WITH KNOWLEDGE OF THE TESTIMONY OF THE WITNESSES, AND TO BE PRESENT AT HIS OWN TRIAL.

The defendant did not understand English and his entire trial was conducted without the assistance of a courtroom interpreter. The defendant was unable to understand the proceedings against him.

The defendant's inability to comprehend the proceedings against him deprived him of his right to assist in his own defense and to confront the witnesses against him with knowledge of the testimony the witnesses had presented at trial.

The defendant was physically present in the courtroom. However, while the defendant was able to observe the trial, it was incomprehensible to him. In the instant case, the right of confrontation and the right to be present at the trial, in the defendant's view, were denied, not because the right to meet the witnesses face to face was denied but by reason of the fact that the defendant was unable to understand the testimony of the witnesses against him.

The trial court recognized the defendant's need for an interpreter at the sentencing stage and appointed a courtroom interpreter. Defense counsel candidly informed the trial court that the absence of a courtroom interpreter was due to his tardiness and that he was not aware that he was required to provide a courtroom interpreter. Trial counsel informed the trial court for the first time about the defendant's inability to comprehend English and communicate with counsel at the sentencing hearing.

The defendant contends that his retained counsel's silence about defendant's need for an interpreter before and during trial was not an effective waiver of his right to understand the proceedings against him. There is nothing in the record that indicates that defense counsel's failure to request or provide an interpreter for the defendant was part of any trial strategy. Conversely, it appears affirmatively in the record that counsel was not aware of the appropriate procedures for the use of a courtroom interpreter.

The defendant contends that his silence on the interpreter issue was not an intentional relinquishment or abandonment of a known right. The defendant had no knowledge of the existence of his right to an interpreter at trial until long after the conclusion of his trial. In defendant's view, his passive acquiescence to the absence

of a courtroom interpreter was due to his lack of knowledge of his right to a courtroom interpreter at his trial and his inability to comprehend the proceedings against him.

The defendant's position is that the proceedings against him were incomprehensible to him and that he was, therefore, incapable of knowingly or intelligently waiving a right he did not comprehend.

The constitutional guarantee of due process in a criminal trial is, in essence, the right to a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed. 2d 297 (1973). That guarantee encompasses both the right of a defendant to confront witnesses against him and his right to assist in his own defense. See U.S. Constitution, amendment VI; *Chambers v. Mississippi*, 410 U.S. at 295, 93 S.Ct. at 1046, *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965).

The decision in the case of *Arizona v. Natividad*, 111 Ariz. 191, 526 P. 2d 730 (1974) (en banc) at page 733, contains an excellent discussion of the issue raised by Petitioner, involving a man on trial who does not understand English, as follows:

> A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against and insensible object, possibly infringing upon the accused's basic right to be present in the courtroom at every stage of his trial. 568 F. 2d at 1132, 526 P. 2d at 733.

The Petitioner was denied his Sixth Amendment Constitutional rights and his right to a fair trial.

There was no waiver of the right to an interpreter in the instant case. The Petitioner had no knowledge of his right to an interpreter at trial or on the direct appeal prepared by trial counsel. The Petitioner raised this right at the first opportunity, upon discovery of the existence of his right to an interpreter. A finding of waiver is warranted only where the record clearly establishes that there was an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966).

Similarly, the inartful drafting of an affidavit, without the benefit of counsel's assistance or a working knowledge of the English language, should not be allowed to deny Petitioner of a full and meaningful review of the denial of his Constitutional rights.

The writ abuse question should not be a bar to the issue raised by the Petitioner, on procedural or substantive grounds. However, assuming arguendo, that the writ abuse question was to be resolved against Petitioner, it is so central to the administration of justice, and his trial so far departs from the accepted course of judicial proceedings, that this Honorable Court may still choose to exercise its inherent supervisory powers to correct the obvious injustice done to the Petitioner.

2.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING THE SUMMARY DENIAL OF THE PETITION FOR WRIT OF HABEAS CORPUS WAS ERRONEOUS AS IT WAS BASED ON THE IMPROPER APPLICATION OF THE DOCTRINE OF ABUSE OF THE WRIT AND AN INACCURATE INTERPRETATION OF PETITIONER'S AFFIDAVIT.

The Petitioner, serving a 45 year prison term, sought relief by filing a pro se writ of habeas corpus in 1979, raising issues as to the evidentiary rulings, double jeopardy, sufficiency of the evidence, and ineffective assistance of counsel. Relief was denied by the district court. Petitioner filed a second pro se petition for writ of habeas corpus in 1983, raising, for the first time, the failure to provide an interpreter at trial issue. This second petition was denied without a hearing, the court declaring that this second petition was abusive of the writ, applying Rule 9 (b). To date the Petitioner has not had a hearing on a petition for writ of habeas corpus.

The Petitioner asserts that the restrictive guidelines applicable to dismissal of a motion under Rule 9 (b) are inapplicable in the instant case, and that the motions were filed pro se is a relevant factor for the court's consideration.

A district court can avoid full consideration of the merits of a claim raised for the first time in a successive habeas petition only if there has been an abuse of the writ. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068 (1963).

Rule 9 (b) is a codification of the seminal case of *Sanders v. United States*, with its guidelines concerning abuse of the writ. Rule 9 (b) did not in any way change the standards that govern habeas corpus petitions in the federal courts; rather, it restates principles that had been previ-

ously judicially developed. Rule 9 (b) is not intended to automatically foreclose each petitioner who fails to claim every ground for relief in his first application in federal court.

Under the abuse of writ doctrine, in order to dismiss a petition without reaching the merits of new grounds raised in a successive petition, it must be shown that the petitioner either deliberately withheld a claim from a previous petition or was inexcusably neglectful. It is clear that a petitioner cannot be charged with having abused the writ if, at the time of his earlier petition, he was unaware of the facts on which his newly asserted claims are based, or was unaware that those facts constituted a basis for which federal habeas corpus relief could be granted. *Haley v. Estelle*, 632 F. 2d 1273 (5th Cir. 1980); *McShane v. Estelle*, 683 F. 2d 867 (5th Cir. 1982).

In determining whether the failure to allege a claim in an earlier petition is excusable, this court has also taken special care in reviewing habeas corpus petitions filed pro se. *Price v. Johnson*, 334 U.S. 266, 68 S.Ct. 1049 (1948). A pro se petitioner should not be penalized because his inexperience in jurisprudence left him unaware of claims he had not considered at the time of his first application for habeas corpus. *McShane v. Estelle*, 683 F. 2d at 870. As this court pointed out in *Sanders*, an applicant for habeas relief ought not to be held to the niceties of a lawyer's pleadings or be cursorily dismissed because his claim seems unlikely to prove meritorious. *Sanders v. United States*, 83 S.Ct. at 1080.

The Petitioner, in his affidavit, stated that he did not intentionally withhold any claims. That averment is uncontradicted. Thus, the issue is then whether, as a matter of law, the record reflects that the Petitioner, acting pro se, was inexcusably neglectful in failing to allege in his second pro se motion.

The record before the district court, considered by the Court of Appeals for the Fifth Circuit, reflects that the Petitioner has proceeded pro se throughout his first and second motions. Moreover, he responded pro se to the magistrate's rule to show cause why his second pro se petition should not be summarily dismissed pursuant to Rule 9 (b), obviously an important pleading. Furthermore, the problems inherent in proceeding pro se on his first and second motions were compounded by the fact that he did not speak or understand the English language. It is difficult to imagine the serious problems that would confront a layman trying to prepare a critical legal pleading in a foreign language. It is respectfully submitted that the Petitioner's response to the magistrate's rule to show cause graphically demonstrates that he did not abuse the writ and that there is no evidence of any purpose to vex, harass or delay in this pro se petition. In his pro se response, the Petitioner explained:

> The defendant has tried on previous occasions to bring these specific issues before the court. The defendant has been assisted by jailhouse attorneys that has hindered his case because of their lack of knowledge, inexperience and communication problems they had with the issues the defendant tried to communicate to them.

This response clearly established, as a matter of law, that he did not abuse the writ. The Petitioner, who is not a lawyer and does not speak or understand English, tried to communicate the claims he thought he had to fellow inmates, or was told of claims by fellow inmates. They in turn, with their limited abilities, knowledge and inexperience, were unable to understand or comprehend the legal significance of his claims and they did not include those claims in the first motion. Surely these claims, including the right to an interpreter, should not be dismissed because abuse of the writ.

The decision of the Court of Appeals for the Fifth Circuit as to writ abuse is predicated upon an interpretation of an affidavit filed pro se in response to the Rule 9 (b) issue. The Petitioner never acknowledged, contrary to the Fifth Circuit Court of Appeals, knowledge in 1979, or prior to the first time he raised the issue as to the right to an interpreter. The obvious explanation for his failure to raise the issue was his lack of knowledge of the existence of the right. Petitioner had no knowledge of the legal significance of the underlying facts of this case until he first learned of his right to an interpreter at trial.

The facts and circumstances of this case are naturally complicated by the Petitioner's lack of working knowledge of the English language. This deficiency cannot properly support the inaccurate interpretation of the affidavit offered by the Court of Appeals for the Fifth Circuit. The Petitioner's basic argument was, and is, that he raised the issue of his right to an interpreter when he first learned of its existence and when he received assistance to put it into the English language.

CONCLUSION

For these reasons, Petitioner, Eliazar Herrera-Vinegas, respectfully prays this Honorable Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1225
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELIAZAR HERRERA-VINEGAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(November 25, 1985)

Before POLITZ, GARWOOD, and JOLLY, *Circuit Judges.*

PER CURIAM:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Eliazar Herrera-Vinegas appeals the district court's abuse of the writ dismissal of his 28 U.S.C. § 2255 motion. Rule 9 (b) of the Rules Governing § 2255 Proceedings.[1]

Herrera was convicted in 1977 of conspiracy and of violating various narcotics laws. His conviction was affirmed. 573 F. 2d 1308 (5th Cir.), *reh. denied*, 576 F. 2d 931 (5th Cir.), *cert. denied*, 439 U.S. 964, 99 S. Ct. 451, 58 L.Ed. 2d 422 (1978). A *pro se* § 2255 pleading was filed in 1979, alleging erroneous evidentiary rulings, double jeopardy, insufficiency of the evidence, and ineffective assistance of counsel. Relief was denied and no appeal was taken.

In 1983 Herrera filed the instant petition, again urging ineffective counsel and raising four new grounds. The district court invoked Rule 9 (b) and dismissed the petition without notice to Herrera and without receiving any evidence. We reversed and remanded, holding that Herrera should have been afforded an opportunity to explain his failure to raise all of his claims in the 1979 application. 738 F. 2d 435 (5th Cir. 1984).

On remand, Herrera filed an affidavit setting forth his response to the 9 (b) issue. He acknowledged his awareness in 1979 of the facts underlying these claims. No adequate explanation for the failure to raise them at that time was offered. Upon recommendation of the magistrate, the district court dismissed the § 2255 motion.

Herrera bears the burden of showing either that at the time of his 1979 motion he lacked knowledge of the facts underlying his instant claims or that he did not understand their legal significance. *Daniels v. Blackburn*, 763 F. 2d 705 (5th Cir. 1985); *Sockwell v. Maggio*, 709 F. 2d

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[1] Rule 9 (b) of the Rules Governing § 2255 Motions provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

341 (5th Cir. 1983).[2] As noted, his affidavit reflects an awareness in 1979 of the facts underlying the instant contentions and the legal significance of those facts. He was twice permitted to amend his 1979 pleadings but failed to raise the four claims now presented. His proffered excuses do not fall within the *Sockwell* exceptions to Rule 9 (b)

AFFIRMED.

[2] Rule 9 (b) of the Rules Governing § 2255 Proceedings is similar to Rule 9 (b) of the Rules Governing § 2254 Cases, and § 2254 Rule 9 (b) cases have precedential value in the consideration of § 2255 motions.